

A Hicom Holdings Bhd v Mahkamah Perusahaan Malaysia & Anor

B HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW
APPLICATION NO R1–25–138 OF 2009
AZIAH ALI J
19 NOVEMBER 2010

C *Labour Law — Employment — Damages — Whether damages for retirement benefits claimable*

D The applicant applied for judicial review under O 53 of the Rules of the High Court 1980 for an order of certiorari to quash part of the award made by the Industrial Court which ordered the applicant to pay the second respondent retirement benefits in addition to backwages and compensation in lieu of reinstatement. The applicant contended that the Industrial Court acted in excess of its jurisdiction in ordering the applicant to pay retirement benefits.

E Counsel for the applicant submitted that the second respondent was not entitled to claim loss of future earnings and such a claim should not be allowed. Counsel further submitted that Parliament has expressed its intention that future earnings are not to be awarded in cases of unfair dismissal vide the Industrial Relations (Amendment) Act 2007 (Act 1322) by inserting a new

F para 4 in the Schedule to the Industrial Relations Act 1967. Counsel for the second respondent submitted that had the applicant not dismissed the second respondent, he would have been entitled to the benefits under the retirement benefit scheme up to the year 2004 when the scheme was dissolved by the applicant.

G **Held**, allowing the application with costs:
Based on the authorities, there was no basis to award retirement benefits. The Industrial Court had committed an error of law in ordering the applicant to pay retirement benefits when it is not a remedy available in industrial law (see

H para 12).

[Bahasa Malaysia summary]

I Pemohon memohon semakan kehakiman di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 bagi suatu perintah certiorari untuk membatalkan sebahagian award yang diberikan oleh Mahkamah Perusahaan yang memerintahkan pemohon membayar kepada responden kedua, faedah persaraan selain daripada gaji tunggakan dan pampasan untuk menggantikan pengembalian jawatan. Pemohon menegaskan bahawa Mahkamah Perusahaan bertindak melampaui bidang kuasanya dalam memerintahkan pemohon

untuk membayar faedah persaraan. Peguambela bagi pemohon menghujahkan bahawa defendan kedua tidak berhak untuk menuntut kehilangan pendapatan akan datang dan tuntutan seperti itu tidak sepatutnya dibenarkan. Peguambela selanjutnya berhujah bahawa parlimen telah menyatakan hasratnya bahawa pendapatan akan datang tidak boleh diawardkan di dalam kes-kes pemecatan tidak adil menerusi Akta Perhubungan Perusahaan (Pindaan) Akta 2007 (Akta 1322) dengan memasukkan perenggan baru iaitu perenggan 4 Jadual kepada Akta Perhubungan Perusahaan. Peguambela bagi responden kedua menghujahkan bahawa sekiranya pemohon tidak memecat responden, responden kedua sepatutnya berhak ke atas faedah-faedah di bawah skim faedah persaraan hingga tahun 2004 di mana skim tersebut telah dibubarkan oleh pemohon.

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Diputuskan, membenarkan permohonan dengan kos:

Berdasarkan autoriti-autoriti, tiada asas untuk mengawardkan faedah persaraan. Mahkamah Perusahaan telah terkhilaf di sisi undang-undang apabila ia memerintahkan pemohon untuk membayar faedah persaraan sedangkan ia bukan remedi yang sedia ada di dalam undang-undang perusahaan (lihat perenggan 12).]

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Notes

For cases on damages for employment, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 924–932.

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Cases referred to

Josephine Banun Ak Pako @ Nur Khatijah binti Abdullah v Hong Leong Bank Bhd [2008] 7 MLJ 867; [2008] AMR 525, HC (refd)

Koperasi Serbaguna Sanya Bhd, Sabah v Dr James Alfred, Sabah & Anor [2000] 4 MLJ 87; [2000] 3 CLJ 758, CA (refd)

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R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

Telekom Malaysia Bhd v Ramli bin Akim [2008] 1 MLJ 770; [2008] 1 CLJ 440, CA (refd)

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Legislation referred to

Industrial Relations Act 1967 ss 20, 33

Industrial Relations (Amendment) Act 2007

Rules of the High Court 1980 O 53

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Edward Saw (Joanne Leong Pooi Yaen with him) (YH Teh & Quek) for the applicant.

Suria Kumar (Suria Kumar & Co) for the second respondent.

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Aziah Ali J:

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[1] The applicant applies for judicial review under O 53 of the Rules of the High Court 1980 for an order of certiorari to quash part of the Award No 212 of 2009 dated 23 February 2009 made by the Industrial Court which ordered the applicant to pay retirement benefits in addition to backwages and compensation in lieu of reinstatement. It is the applicant's contention that the Industrial Court has acted in excess of its jurisdiction in ordering the applicant to pay retirement benefits.

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BACKGROUND

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[2] The second respondent was dismissed by the applicant on 17 August 1996 pursuant to disciplinary action. The second respondent made representation under s 20 of the Industrial Relations Act 1967 ('the IRA') and on 25 February 1998 the matter was referred to the Industrial Court. On 5 December 1998 the Industrial Court dismissed the second respondent's claim of wrongful dismissal. The second respondent then moved the High Court for orders of certiorari. The High Court found that the second respondent was dismissed without just cause or excuse and quashed the award of the Industrial Court. The matter was remitted to the Industrial Court for assessment of the appropriate reliefs to be ordered to the second respondent.

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[3] Before the Industrial Court counsel for the second respondent submits that the claim for retirement benefits is a claim for loss of future earnings. It is contended that had the applicant not dismissed the second respondent, he would have been entitled to the benefits under the retirement benefit scheme up to the year 2004 when the scheme was dissolved by the applicant. In support

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counsel relies on the case of *Josephine Banun Ak Pako @ Nur Khatijah binti Abdullah v Hong Leong Bank Bhd* [2008] 7 MLJ 867; [2008] AMR 525 wherein Hamid Sultan Abu Baker JC (as His Lordship then was) said, inter alia:

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... The award must reflect restitution for the contemptuous conduct of the respondent who had, without due care and regard of the employees' interest as a whole, imposed on an honest employee who had diligently served the respondent for about a decade, wrongful and false accusation of misappropriation of RM500. As a result, the respondent has destroyed the self respect, esteem of the employee as well as that of her family members, which must have caused great stress to the applicant and her family members. In such cases, there is nothing inequitable or

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unconscionable for the applicant to be compensated in full. This is a case which warrants to do so.

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[4] Counsel for the applicant on the other hand submits that the second respondent is not entitled to claim loss of future earnings and such a claim should not be allowed. In support counsel for the applicant relies on the case of *Telekom Malaysia Bhd v Ramli bin Akim* [2008] 1 MLJ 770; [2008] 1 CLJ 440.

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[5] In the award the Industrial Court acknowledged that in cases of unfair dismissal, there are two types of compensation ie backwages and compensation in lieu of reinstatement. The Industrial Court is of the view that retirement benefits cannot be considered future earnings because cl 8.12 of the second respondent's contract of employment states that the applicant shall provide retirement benefits to its officers upon attaining the normal retirement age. The Industrial Court opined that it is fair and equitable to award retirement benefits which the second respondent would have been entitled to if not for the dispute regarding his dismissal.

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[6] By Award No 212 of 2009 the Industrial Court ordered the applicant to pay:

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(a) backwages amounting to RM176,366.40, and

(b) retirement benefits amounting to RM126,763.35.

Subsequently the applicant made an application to the Industrial Court under s 33 of the IRA for the interpretation of a provision of Award No 212 of 2009 which reads '*The Court further orders that the amount of backwages and the retirement benefits mentioned above less statutory deductions, if any to be paid to through the claimant's solicitor within 30 days from the date of this Award.*' The applicant submits that the said provision ought to be interpreted as the applicant being ordered to pay backwages and retirement benefits only as there is no order for the payment of compensation in lieu of reinstatement.

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[7] By Award No 1015 of 2009 dated 18 August 2009 the Industrial Court found from the notes of evidence of the proceedings on 13 June 2008 that compensation in lieu of reinstatement (item 4) had been agreed between the parties. Therefore the Industrial Court decided that apart from getting the agreed compensation in lieu of reinstatement, the second respondent would also be paid retirement benefits.

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SUBMISSIONS

[8] Counsel for the applicant submits that the Industrial Court has no jurisdiction to order retirement benefits because it is future earnings as it is an

- A amount that the second respondent would have earned had he not been dismissed or an amount that he would have earned had he been reinstated. The second respondent has been awarded compensation in lieu of reinstatement which counsel submits is intended to compensate the workman for all incidental earnings lost, including retirement benefits, as a result of not being
- B reinstated. Counsel refers to the case of *Telekom Malaysia Bhd v Ramli bin Akim*. In that case the Industrial Court had ordered payment of backwages, loss of future earnings and compensation in lieu of reinstatement. The Court of Appeal held, inter alia, as follows:
- C Rama Chandran is not an authority to support the proposition that in all cases of unfair dismissal, future loss of earnings must be awarded. One crucial point that must be noted in *Rama Chandran* was that the Federal Court never awarded compensation in lieu of reinstatement. Hence, this could be the basis as to why future loss of earnings was awarded. However, *in the present case, the Industrial Court had already granted backwages and compensation in lieu of reinstatement to the respondent. There was therefore no basis for the court to award future loss of earnings to the respondent. Future loss of earnings has never been an established and recognised head of damages in the Industrial Court, ...* Therefore, the Industrial Court's award for future loss of earnings ought to be set aside. (Emphasis added.)
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- E [9] Counsel further submits that the Parliament has expressed its intention that future earnings are not to be awarded in cases of unfair dismissal vide the Industrial Relations (Amendment) Act 2007 (Act 1322) by inserting a new para 4 in the Schedule to the IRA which reads as follows:
- F SECOND SCHEDULE
- FACTORS FOR CONSIDERATION IN MAKING AN AWARD IN
RELATION TO A REFERENCE UNDER SUBSECTION 20(3)
- [Subsection 30(6a)]
- G (1) In the event that backwages are to be given, such backwages shall not exceed twenty-four months' backwages from the date of dismissal based on the last-drawn salary of the person who has been dismissed without just cause or excuse;
- H (2) In the case of a probationer who has been dismissed without just cause or excuse, any backwages given shall not exceed twelve months' backwages from the date of dismissal based on his last-drawn salary;
- I (3) Where there is post-dismissal earnings, a percentage of such earnings, to be decided by the Court, shall be deducted from the backwages given;
- (4) *Any relief given shall not include any compensation for loss of future earnings; and*

(5) Any relief given shall take into account contributory misconduct of the workman. A

[10] For the second respondent counsel submits that retirement benefit is not future earnings as it is the second respondent's entitlement pursuant to the applicant's retirement scheme. On 1 March 2004 the fund was dissolved and all members received payment. It is submitted that the second respondent ought not to be denied this payment as even an employee who resigns after completing five years of service is entitled to the benefit. In the present case the second respondent had been dismissed without just cause or excuse therefore it is submitted that he should be entitled to the benefit. B
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DECISION

[11] In *Telekom Malaysia Bhd v Ramli bin Akim* the Court of Appeal affirmed that future loss of earnings has never been an established and recognised head of damages in the Industrial Court and where the Industrial Court has already granted backwages and compensation in lieu of reinstatement there is no basis for the court to award future loss of earnings. The Court of Appeal further affirmed that the ruling in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 on compensation was peculiar to the facts of the case and not intended to be of general application in all Industrial Court cases. The Court of Appeal pointed out that in *Rama Chandran* the Federal Court never awarded compensation in lieu of reinstatement. Hence, this could be the basis as to why future loss of earnings was awarded. The Court of Appeal also referred to another Court of Appeal decision in *Koperasi Serbaguna Sanya Bhd, Sabah v Dr James Alfred, Sabah & Anor* [2000] 4 MLJ 87; [2000] 3 CLJ 758; . In that case the Court of Appeal ruled that in industrial law involving compensation for unfair dismissal, there are only two types of compensation, which is backwages and compensation in lieu of reinstatement. D
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[12] In the present case the second respondent has been awarded both backwages and compensation in lieu of reinstatement. Based on the aforementioned authorities there is no basis to award retirement benefits. In *Koperasi Serbaguna Sanya Bhd, Sabah v Dr James Alfred, Sabah & Anor* the Court of Appeal said: H

... it is open to the High Court in certiorari proceedings to determine whether the compensation awarded by the Industrial Court is in accordance with law. If it is not, then I see no reason why an award of compensation may not be quashed. I

I agree with counsel for the applicant that the Industrial Court has committed an error of law in ordering the applicant to pay retirement benefits when it is

A not a remedy available in industrial law. For the reasons stated above I allowed the application with costs of RM4,000 to the applicant.

Application allowed with costs.

B Reported by Kanesh Sundrum

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